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No. 96-44

In the Supreme Court of the United States

OCTOBER TERM, 1996

CMC HEARTLAND PARTNERS, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WALTER DELLINGER
Acting Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

JOHN A. BRYSON
ANNE S. ALMY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether, for purposes of bankruptcy law, a liability claim based on a state statute can arise before enactment of the statute that creates liability for that conduct.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner is the successor of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee Road), which was reorganized under Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. 205 (1976), in accordance with a consummation order entered in 1985. After the entry of the consummation order, Union Pacific Railroad Company sought reimbursement from petitioner for the cost of cleaning up hazardous wastes at a property, located in Tacoma, Washington, that was formerly owned by Milwaukee Road. Union Pacific asserted its claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, and the Washington State Model Toxics Control

Act (MTCA), Wash. Rev. Code §§ 70.105D.010 *et seq.* (1994). Petitioner filed this action in the district court that had jurisdiction over the reorganization to enjoin Union Pacific from asserting those claims. That court enjoined Union Pacific from asserting liability claims under CERCLA, but refused to enjoin Union Pacific from asserting analogous claims under the MTCA, which had not been enacted until after the court's order consummating the bankruptcy reorganization. The court of appeals affirmed that ruling.

1. The Constitution grants Congress the power to "establish * * * uniform Laws on the subject of Bankruptcies." U.S. Const. Art. I, § 8, Cl. 4. During the nineteenth century, Congress exercised that power by enacting a series of bankruptcy statutes that allowed insolvent debtors to discharge their debts through the liquidation of their assets. See Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803); Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843); Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878); Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978). Those statutes generally did not provide businesses with an opportunity to satisfy their debts through reorganization. In response, financially encumbered businesses, particularly railroads, employed the device of the equity receivership to adjust their debts while remaining in operation. See John C. Anderson, *Chapter 11 Reorganizations* §§ 1.01-1.06 (1995).

During the Great Depression, Congress recognized the need to provide a mechanism for reorganization under the federal bankruptcy laws. Based on the experience gained through equity receiverships, Congress amended the Bankruptcy Act of 1898 to provide for reorganization of bankrupt business entities. Those amendments included enactment of: (1) Section 77, which governed railroad reorganizations (see Act of Mar. 3, 1933, ch. 204, § 1, 47 Stat.

1474); (2) Section 77B, which governed other business reorganizations (see Act of June 7, 1934, ch. 424, § 1, 48 Stat. 912); and Chapters X through XII, which replaced Section 77B (see Chandler Act, ch. 575, § 1, 52 Stat. 883-930 (1938)). See generally 5 Lawrence P. King, *Collier on Bankruptcy* ¶ 1100.01 (15th ed. 1996); John C. Anderson, *Chapter 11 Reorganizations* §§ 1.01-1.06 (1995); James W. Moore, *Moore's Bankruptcy Manual* (1939).

In 1978, Congress comprehensively revised the federal bankruptcy laws through enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, which repealed and prospectively replaced the Bankruptcy Act of 1898 and its amendments. The revised laws are currently codified as the Bankruptcy Code, 11 U.S.C. 101 *et seq.* Chapter 11 of the Bankruptcy Code provides for reorganization of debtors. See 11 U.S.C. 1101 *et seq.* The provisions of Chapter 11 are generally similar, but not identical, to those contained in the 1898 Act.

Under Chapter 11, a debtor (and, in certain circumstances, other parties in interest) may submit a plan for reorganization. See 11 U.S.C. 1121. Creditors are entitled to express approval of or opposition to the plan. See 11 U.S.C. 1126. If the plan satisfies specific requirements contained in the Code, a court may confirm it. See 11 U.S.C. 1129. As a general matter, the confirmation of a reorganization plan "discharges the debtor from any debt that arose before the date of such confirmation" unless the plan or order confirming the plan provides otherwise. 11 U.S.C. 1141(d).

2. On December 19, 1977, Milwaukee Road petitioned the United States District Court for the Northern District of Illinois for reorganization under Section 77 of the Bankruptcy Act of 1898, 11 U.S.C. 205 (1976), which was then in force. While the reorganization was in progress, Union Pacific purchased approximately 100 miles of rail-

road right-of-way and various properties from the bankruptcy trustee for Milwaukee Road. Pet. App. 2a, 23a-24a. The properties included a railyard in Tacoma, Washington, that Milwaukee Road had owned from the early years of this century. *Id.* at 24a. As part of that transaction, which took place on December 19, 1980, Union Pacific received a covenant from the Trustee and Milwaukee Road "to indemnify and save harmless Union Pacific * * * against any and all claims * * * arising out of the operations of the properties prior to March 12, 1980." *Id.* at 39a.

The reorganization progressed through the enactment of the Bankruptcy Reform Act of 1978, which provided that ongoing reorganizations would continue to be governed by the 1898 Act. See Pub. L. No. 95-598, § 403, 92 Stat. 2683. On July 12, 1985, the district court confirmed the debtor's reorganization plan and established bar dates for post-petition claims. Pet. App. 2a, 24a. On November 12, 1985, the court entered a consummation order that barred and discharged all claims against the Trustee, Milwaukee Road, and petitioner, as Milwaukee Road's successor, except as provided in the reorganization plan. See *ibid.* That plan bars all claims for contribution and indemnity existing as of the confirmation and consummation dates except "claims for contribution or indemnity based on facts that are unknown, undisclosed or unasserted" as of those dates. *Id.* at 42a.

3. While petitioner's reorganization was in progress, Union Pacific learned through various inspections and reports that the Tacoma site contained discarded industrial materials. Pet. App. 24a-27a. In 1990, after the consummation of petitioner's reorganization, Union Pacific decided to sell the property. It commissioned a pre-sale environmental audit, which disclosed subsurface contamination from petroleum and other products. *Id.* at 27a. That audit heightened concerns about potential liability

under federal and state law. The United States and the State of Washington had each enacted legislation imposing retrospective liability on responsible parties for the remediation of sites containing improperly discarded hazardous substances. See CERCLA § 107, 42 U.S.C. 9607; MTCA § 4, Wash. Rev. Code § 70.105D.040 (1994). Congress enacted CERCLA in 1980, see Pub. L. No. 96-510, 94 Stat. 2767, while the Washington legislature enacted the MTCA in 1989, see 1989 Wash. Laws ch. 2.

Union Pacific notified the United States Environmental Protection Agency (EPA) and the Washington Department of Ecology (DOE) of the contamination. Pet. App. 27a. The DOE informed Union Pacific that it was potentially liable for clean-up of the property under the MTCA, which obligates the owner of a contaminated property, as well as others who contributed to the hazards, to clean up the site. See Wash. Rev. Code § 70.105D.040 (1994). Union Pacific ultimately entered into an agreement with the DOE to assume responsibility for cleaning up the property and moved forward with the remedy. See Pet. App. 27a.

4. On September 9, 1991, Union Pacific sent petitioner a letter seeking to negotiate over petitioner's potential liability for clean-up and response costs to be incurred at the Tacoma site. Pet. App. 27a. In response, petitioner filed this action in the Illinois district court that confirmed the bankruptcy reorganization and requested that court to enjoin Union Pacific from prosecuting any claims respecting the site. *Ibid.* While petitioner's request for an injunction was under consideration, Union Pacific filed a complaint against petitioner in the United States District Court for the Western District of Washington for its response costs, predicating liability on CERCLA, the MTCA, and the indemnification terms of the original sales contract. *Id.* at 27a-28a.

The Illinois district court granted in part petitioner's motion to enjoin Union Pacific's action. Pet. App. 37a-46a. The court observed that, under the terms of the consummation order, petitioner remained liable for "claims for contribution or indemnity based on facts that are unknown, undisclosed or unasserted" as of the relevant confirmation and consummation dates. *Id.* at 42a. The court concluded that Union Pacific, which had participated in the reorganization proceedings, had adequate knowledge under the facts presented here to have asserted a CERCLA claim in those proceedings. *Id.* at 44a.

The district court ruled, however, that the consummation order did not bar Union Pacific's MTCA claim, because the MTCA "had not been enacted by the State of Washington at the time the consummation order was entered" and Union Pacific "could not possibly have known of its liability under a statute that was not in existence until four years after the bar dates were established." Pet. App. 45a, citing *In re Penn Central Transp. Co.*, 944 F.2d 164 (3d Cir. 1991), cert. denied, 503 U.S. 906 (1992). The court accordingly entered an order enjoining Union Pacific from "asserting or attempting to prosecute" any claims for contribution or indemnity under CERCLA, but did not extend that relief to claims under the MTCA. *Id.* at 46a. Both parties appealed.

5. The court of appeals affirmed the district court's judgment in part, vacated it in part, and remanded for further proceedings. Pet. App. 19a-34a. The court of appeals concluded that the controlling issues were whether: (1) "Union Pacific's claim for indemnification of its liability under federal law arose before the discharge and thus was barred"; and (2) "Union Pacific's claim for indemnification of its liability under state law arose after the discharge and thus was not barred." *Id.* at 23a. The court of appeals agreed with the district court "that Union

Pacific's claim under CERCLA was barred," but remanded the case for further consideration of the MTCA claim. *Ibid.*

The court of appeals explained that Union Pacific's CERCLA claim was barred because Union Pacific could have asserted that claim in the bankruptcy proceeding. Pet. App. 30a-33a. The court had previously stated in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 974 F.2d 775 (7th Cir. 1992), that Section 77(b) of the Bankruptcy Act of 1898, 11 U.S.C. 205(b) (1976) (repealed 1978), "broadly defines claims to include 'debts, whether liquidated or unliquidated . . . or other interests of whatever character.'" 974 F.2d at 780. The court accordingly ruled in that case that a potential CERCLA claimant is obligated to submit a CERCLA claim in a Section 77 reorganization, even if the claim is contingent on the occurrence of additional events, if the potential claimant has evaluated a contamination problem and "can tie the bankruptcy debtor to a known release of a hazardous substance which th[e] potential claimant knows will lead to CERCLA response costs." *Id.* at 786. See Pet. App. 21a-22a. Applying that reasoning, the court of appeals concluded that the district court had correctly determined that Union Pacific had sufficient constructive knowledge of the contamination problem during the reorganization proceeding to file a "contingent" CERCLA claim before the bar dates. *Id.* at 30a-33a.

The court then turned to petitioner's contention on appeal that Union Pacific's MTCA claim was also barred. Pet. App. 33a-34a. Petitioner did not contest that the MTCA went into effect after the bar dates or that, under prevailing law, "claims based on a statute enacted after discharge in bankruptcy are not barred." *Id.* at 33a. See

Penn Central, 944 F.2d at 168. Petitioner instead argued as follows:

> The crucial factor in the district court's refusal to bar Union Pacific's MTCA claims was the fact that MTCA was enacted in 1989 *after* the bar dates and consummation order in the Milwaukee Road bankruptcy. The district court accepted Union Pacific's contention that, as a matter of law, a bankruptcy claim cannot be barred unless the precise statute under which the claim is asserted already existed before the bar date.
>
> [Petitioner] maintain[s] that as a matter of law the district court has articulated and applied an incorrect test. The proper legal test should be to determine whether a newly-enacted statute creates new rights for the putative claimant or merely recodifies existing rights. If the latter, as is the case here, the claim must be barred.

Appellant CMC Heartland Partners C.A. Br. 17 (Nos. 92-3713 & 92-3790). See *id.* at 17-26.

Based on that submission, the court of appeals vacated the district court's judgment on the MTCA claim and remanded the case with directions that "the district court first determine what liabilities under the [MTCA], if any, were imposed under previous Washington statutes, and then decide what, if any, specific cleanup liabilities under previous state statutes were discharged because no claims were timely presented to the bankruptcy court." Pet. App. 23a. See *id.* at 33a-34a.

6. On remand, the district court referred the case to a magistrate judge who compared the cause of action available under the MTCA to three Washington state statutory schemes existing at the time of the bankruptcy. The magistrate judge concluded that the MTCA created lia-

bility different from that imposed by those pre-existing statutes. See Pet. App. 4a, 54a-55a. Petitioner filed objections to the magistrate judge's report, but the district court overruled those objections. *Id.* at 47a-64a. The court determined that the question on remand was "whether Union Pacific faced the same type of liability under the [MTCA] as Union Pacific faced under the prior existing statutes." *Id.* at 55a-56a. It carefully examined the content of the prior state statutes and concluded that the MTCA imposed a new form of liability. *Id.* at 57a-64a.

7. Petitioner appealed again, and the court of appeals affirmed the district court's decision. Pet. App. 1a-18a. The court of appeals reviewed the prior history of the case, *id.* at 2a-8a, and stated that in its prior decision it had "joined other courts * * * in concluding that claims based on a statute enacted after the discharge date are not barred," *id.* at 3a, citing *Penn Central*. The court then examined whether, "in 1985, * * * Union Pacific ha[d] a contingent claim, based on the three existing Washington statutes, which would bar its claim based on Washington's 1989 [MTCA]." *Id.* at 9a. The court found that "[t]he Washington statutes did not provide the comprehensive liability or remedy found in the [MTCA]." *Id.* at 10a. See *id.* at 10a-17a. It accordingly concluded that the "Washington statutes existing in 1985 did not form the basis for the filing, by Union Pacific, of a contingent claim in the Milwaukee Road bankruptcy proceeding." *Id.* at 17a. The court of appeals also rejected petitioner's claim that newly discovered evidence warranted a different result. *Id.* at 17a-18a.

DISCUSSION

Petitioner asks this Court to review whether a federal bankruptcy claim based on state law arises at the time when the conduct underlying the claim occurs, or at the time when state law creates a cause of action imposing liability for that conduct. We submit that review of that issue is not warranted in this case. Petitioner did not present its current legal theory to the court of appeals. Moreover, the court of appeals' decision is correct. There is no conflict among the courts of appeals on the question whether a post-discharge statutory enactment that imposes retrospective liability should be treated as creating a claim that arises at the time the underlying conduct occurred. There is a conflict on the question, not presented here, when a claim that is based on a pre-discharge cause of action, but is dependent on future events, arises for purposes of the Bankruptcy Code. The resolution of that conflict, however, should await a case that squarely presents the issue that has actually divided the courts of appeals.

1. Petitioner seeks review of an issue that was neither developed nor addressed in the proceedings below. In its first decision, the district court concluded that the consummation order discharging the liability of Milwaukee Road and its successors could not bar Union Pacific's claim "under a statute that was not in existence until four years after the bar dates were established for filing claims against the Milwaukee Road." Pet. App. 45a. The district court explicitly followed the Third Circuit's decision in *Penn Central*, which held that a consummation order that was entered before enactment of CERCLA did not discharge a post-consummation CERCLA claim. See 944 F.2d at 168. The district court concluded that *Penn Central* was controlling here, noting that petitioner had

"cite[d] no authority to support barring Union Pacific from prosecuting [its MTCA] claim." Pet. App. 45a.

In its first appeal, petitioner did not challenge the holding of *Penn Central* and similar cases, but instead attempted to distinguish them. Pet. App. 33a. Petitioner argued that, "[i]n those cases, claims were allowed only if the liability of the debtor or the claimant's rights to proceed against the debtor did not exist before the bankruptcy bar dates." Appellant CMC Heartland Partners C.A. Br. 22 (Nos. 92-3713 & 92-3790). Petitioner asserted that the district court had erred "by failing to examine Union Pacific's liability and claims under MTCA to see if they varied from the claims Union Pacific possessed in 1985 but elected not to submit to the reorganization court." *Id.* at 26. The court of appeals responded to that argument by remanding the case to the district court to determine "what liabilities under the [MTCA], if any, were imposed under previous Washington statutes." Pet. App. 23a.

On remand, the district court and a magistrate judge carefully examined that question and concluded that the MTCA imposed a new form of liability. Pet. App. 47a-64a. Petitioner appealed from that ruling, and the court of appeals rejected petitioner's argument that "Union Pacific's environmental clean-up liability was essentially similar under the 1985 Washington state statutes and the [MTCA]." Appellant CMC Heartland Partners C.A. Br. 14 (No. 95-1412) (argument heading). Petitioner did not argue, as its does here, that "[a] federal bankruptcy 'claim' arises at the time the relevant conduct occurs, not at the time state law creates liability based on such conduct." Pet. 8 (argument heading).[1]

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[1] Petitioner gave the first hint of its current argument in its petition for rehearing and suggestion for rehearing en banc. In the last three pages of that document, petitioner challenged the court of appeals'

This Court does not ordinarily grant a petition for a writ of certiorari to consider claims that were not raised below. See, *e.g.*, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327, 328 (1945) (per curiam); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935). The Court has distinguished, however, between claims and arguments in support of those claims. Once a writ of certiorari is granted on a properly presented federal claim, "a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Nevertheless, the Court should be cautious in granting certiorari based on a new legal theory that had not been fully litigated in the current case or a past decision of the court below. See *id.* at 538.

Union Pacific contends that petitioner did not properly present to the court of appeals the claim that it presents here. See Br. in Opp. 9-13. At a minimum, petitioner did not present the legal theory that it now advocates, and the

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decision on policy grounds, stating that the decision "would give state and local governments the ability to vitiate any claims bar date by simply enacting new legislation after the bar date had passed," that the court had "favored *state* environmental policies over competing *federal* policies," and that it had "opened the door to state lawmakers allowing them to thwart federal bankruptcy law." Pet. for Rehearing, with Suggestion for Rehearing in Banc 13-15 (Nos. 95-1412 & 95-2986). Petitioner, however, did not assert its current legal argument or suggest that there was any conflict among the courts of appeals on the question. See 7th Cir. R. 35(b) ("Suggestions that an appeal be reheard en banc must state in a concise sentence at the beginning of the petition * * * with what decision of the United States Supreme Court, this court, or *another court of appeals* the panel decision is claimed to be in conflict." (emphasis added)).

court of appeals had no occasion to address that theory. The court of appeals decided the case based on the arguments placed before it, expressly rejecting petitioner's theory that Union Pacific's claims were barred because Union Pacific could have asserted an analogous claim under the state laws then in existence. Hence, as a preliminary consideration, the Court should be reluctant to address petitioner's new theory without "the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee*, 503 U.S. at 538.[2]

2. In any event, petitioner's new theory does not warrant review. Petitioner contends that Union Pacific's claim under the MTCA is barred because it "arose *before* the Milwaukee Road's bankruptcy discharge." Pet. 8. According to petitioner, Union Pacific's claim under the MTCA arose when "the contamination or violation occurred" at the Tacoma site, even though the MTCA had not yet been enacted (and Union Pacific did not yet own the site). See Pet. 10 (emphasis and citation omitted). That counter-intuitive contention is not well founded.

Petitioner's argument is contrary to the language of both the Bankruptcy Act of 1898 and the current Bank-

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[2] In response to Union Pacific's brief in opposition, petitioner contends that it consistently argued below that Union Pacific's claim should be barred because Union Pacific knew about the underlying contamination but failed to file a contingent claim. Pet. Reply Br. 6, quoting Appellant CMC Heartland Partners C.A. Br. 18 (Nos. 92-3713 & 92-3790). Petitioner's argument below appears, however, to have been more limited. Petitioner asserted that Union Pacific had the opportunity to file a contingent claim because the MTCA "amount[ed] to little more than a recodification of prior state law" and "provided Union Pacific with no greater, or different, rights against [petitioner] than it had before the bankruptcy bar dates." Appellant CMC Heartland Partners C.A. Br. 18 (Nos. 92-3713 & 92-3790).

ruptcy Code. Section 77(b) of the Bankruptcy Act of 1898 defined "claims" to include

> debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character.

11 U.S.C. 205(b) (1976) (repealed 1978). The current Bankruptcy Code defines a "claim" in relevant part as a

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

11 U.S.C. 101(5)(A). The definitions contained in the Bankruptcy Act of 1898 and the current Bankruptcy Code are not necessarily co-extensive, but they lead to the same result in this case. Union Pacific did not have any "interest" or "right to payment" under the MTCA until the State of Washington enacted that statute. See *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990) ("a 'right to payment' is nothing more nor less than an enforceable obligation"). It would be farfetched to conclude that Union Pacific had a "contingent" interest or right to payment in 1985 based on the possibility that the State might someday enact a statute that would create the underlying right. See *In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995).[3]

Petitioner is mistaken in its contention that the court of appeals "violated federal law and policy by looking to

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[3] See also, *e.g.*, Ralph E. Clark, *Contingent and Immature Claims in Receivership Proceedings*, 29 Yale L.J. 481, 482 (1920) ("A contingent claim is one which is not absolutely owing at the time insolvency occurs and the receiver is appointed, but may ripen into an absolute claim later on.").

state law to determine when a 'claim' arose for federal bankruptcy purposes." Pet. 9. That court simply recognized that *federal bankruptcy law* looks to federal and state non-bankruptcy law in determining whether a potential claimant has a cognizable claim. As this Court has specifically noted, the federal bankruptcy laws provide a mechanism for adjustment of rights and interests that arise "independent" of the bankruptcy process and that exist as a matter of federal or state non-bankruptcy law. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (plurality opinion); see *Grogan* v. *Garner*, 498 U.S. 279, 283-284 & n.9 (1991); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 161 (1946); *id.* at 170 (Frankfurter, J., concurring) ("a claim implies the existence of an obligation created by State law"). There is nothing anomalous in the fact that the federal bankruptcy laws do not treat a "claim" as arising until state law creates the "interest" or "right to payment." See *Chateaugay*, 53 F.3d at 497.

There is also no merit to petitioner's contention that the court of appeals' decision has "jeopardized the fundamental predictability and stability of the uniform federal bankruptcy laws." Pet. 11. At bottom, petitioner contends that the federal bankruptcy laws should preempt the application of the MTCA to a reorganized entity. See Pet. 13 n.11 (federal bankruptcy laws "trump inconsistent state enactments outright"). There is no occasion, however, for federal law to preempt state law here, because there is no inconsistency between the bankruptcy laws and the state law involved in this case. The current Bankruptcy Code provides relief from the financial obligations that precipitated insolvency by discharging the debtor "from any debt that arose before the date of such confirmation" unless the plan or order confirming the plan provides otherwise. 11 U.S.C. 1141(d). In this case, Union Pacific did not have a

claim under the MTCA at the time of confirmation, and the current Bankruptcy Code (even if it were applicable) would not have discharged any corresponding debt. See 11 U.S.C. 101(12) (defining "debt" as "liability on a claim"). The same result follows under the Bankruptcy Act of 1898. See 11 U.S.C. 205 (1976). There is simply no conflict between the federal and state laws.[4]

3. We also disagree with petitioner's contention that this case presents an important question that has divided the circuits and warrants immediate review. As an initial matter, there is no conflict among the courts of appeals on the specific issues that the court of appeals actually addressed. The Second, Third, and Seventh Circuits have all concluded that "claims based on a statute enacted after the discharge date are not barred." Pet. App. 3a; see *Chateaugay*, 53 F.3d at 497; *Penn Central*, 944 F.2d at 168. No other courts of appeals have addressed that question.[5]

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[4] Furthermore, petitioner does not contest that Congress has imposed retrospective liability on reorganized entities through CERCLA, which subjects such entities to liability for past waste disposal activities. Pet. 13 n.11 (citing *Penn Central*). Hence, there is no basis to conclude that a State's enactment of complementary laws to achieve the same objective "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). This is, in sum, a particularly unpersuasive context in which to argue that federal bankruptcy laws preempt the States from imposing retrospective liability on all persons who engaged in similar conduct during a defined time period and require the States, instead, to distinguish between those that underwent intervening reorganizations and those that did not.

[5] Notwithstanding petitioner's suggestion of a "parade of horribles" (Pet. 15), we are not aware of any other pending litigation in which a reorganized entity claims immunity from post-discharge statutory enactments that impose retrospective liability.

Furthermore, there is little likelihood that a conflict will develop among the courts of appeals over the question whether the MTCA creates new liability distinct from prior state law. See Pet. App. 10a.

Petitioner contends that this case is part of a larger conflict among the courts of appeals as to when a claim "arises" for purposes of bankruptcy. Pet. 13-15. Petitioner is mistaken in that characterization of this case. There is a disagreement among those courts on the question whether a potential suit that would rest on a cause of action that existed *before* the bankruptcy, but is contingent on future events, is a "claim" for purposes of the Bankruptcy Code. But those cases present an issue that is distinct from the question presented in this case.

The Third Circuit's decision in *In re Frenville Co.*, 744 F.2d 332 (1984), cert. denied, 469 U.S. 1160 (1985), lies at the center of that disagreement. The Third Circuit there held that the Bankruptcy Code's automatic stay provision, 11 U.S.C. 362(a), did not stay a creditor's indemnification suit against the debtor where the creditor's contractual right to indemnification existed before the bankruptcy, but did not mature into a cause of action until after the bankruptcy petition was filed. 744 F.2d at 335-336. Other courts of appeals have criticized *Frenville*'s reasoning and have concluded that a potential suitor can have a "contingent" claim, within the meaning of the Bankruptcy Code, if there is a significant pre-petition relationship between the debtor and the potential claimant, see *Epstein* v. *Official Comm. of Unsecured Creditors of the Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995); or if the potential claimant has sufficient notice so that the potential liability is within the fair contemplation of the parties at the time of the bankruptcy, see *In re Jensen*, 995 F.2d 925, 930-931 (9th Cir. 1993). See also *In re Chateaugay Corp.*, 944 F.2d 997, 1004-1005 (2d Cir. 1991)

(discussing, but not deciding the issue); *Grady* v. *A.H. Robins Co.*, 839 F.2d 198, 201-203 (4th Cir.) (suggesting in the context of an automatic stay that pre-petition conduct is enough to establish a claim), cert. dismissed, 487 U.S. 1260 (1988).

That conflict over the scope of contingent claims is not implicated here. The cases criticizing *Frenville* all involved potential suits based on a statutory or common law cause of action that was in existence at the time of the bankruptcy. The critical issue in each case was whether a potential suit that would become actionable only on the occurrence of a future event, such as illness or injury that satisfies an element of a product liability cause of action, was a contingent claim for purposes of bankruptcy. None of those cases involved the post-discharge enactment of a new statute. Petitioner is incorrect in asserting that there is "no relevant difference" between those situations. Pet. Reply Br. 5 n.3. A person who can point to an existing but unripe cause of action at the time of a bankruptcy reorganization may have a "contingent" right to payment. See 11 U.S.C. 101(5)(A). But the person who cannot point to an existing cause of action at the time of bankruptcy has no right to payment at all. See *Chateaugay*, 53 F.3d at 497 ("where the statute imposing the liability has not been enacted, 'it would be impossible to find even the remotest "right to payment" ' " (citation omitted)).

Petitioner may be correct that the split of authority precipitated by *Frenville* presents an issue of general importance under the bankruptcy laws. Pet. 14. But this case does not provide an occasion for this Court to attempt to resolve that question. The court of appeals did not cite, discuss, or rely on the reasoning of *Frenville* or any of the cases that have criticized that decision. Nor did it have any reason to do so. Moreover, this case arises under the Bankruptcy Act of 1898, which has been repealed and has

limited continuing importance. If the Court is to provide guidance on the issues raised by *Frenville*, it should await a case that squarely presents those issues and does so in the context of the current Bankruptcy Code.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
JOHN A. BRYSON
ANNE S. ALMY
Attorneys

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